STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

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| IN THE MATTER OF THE PETITION OF INDIANA BELL TELEPHONE COMPANY, INCORPORATED, D/B/A AMERITECH INDIANA PURSUANT TO I.C. 8-1-2-61 FOR A THREE-PHASE PROCESS FOR COMMISSION REVIEW OF VARIOUS SUBMISSIONS OF AMERITECH INDIANA TO SHOW COMPLIANCE WITH SECTION 271(c) OF THE TELECOMMUNICATIONS ACT OF 1996 | } | CAUSE NO. 41657 |

**AMERITECH INDIANA'S PETITION FOR RECONSIDERATION OF ORDER ADOPTING PERFORMANCE ASSURANCE AND REMEDY PLAN**

Pursuant to IND. CODE § 8-1-3-2 and 170 IAC 1-1.1-22(e), Indiana Bell Telephone Company, Incorporated ("Ameritech Indiana") petitions the Indiana Utility Regulatory Commission ("IURC" or "Commission") to reconsider and vacate its October 16, 2002 Order on Performance Assurance Plan entered in this cause ("Order"), which adopted an SBC Ameritech Indiana Performance Assurance and Remedy Plan ("IURC Remedy Plan" or "IURC Plan").

This cause involves Ameritech Indiana's planned application to the Federal Communications Commission ("FCC"), under § 271 of the Federal Telecommunications Act of 1996 ("Act"), to provide intrastate, interLATA telecommunications services in Indiana ("§ 271 Application"), and specifically, the nonbinding recommendation that the Act contemplates the IURC's making to the FCC on that § 271 Application. The grounds for this Petition are (1) the Commission lacked statutory authority to enter the Order adopting the IURC Remedy Plan, including its provisions requiring Ameritech Indiana to make monetary payments ("Payments") to competing local exchange carriers ("CLECs") and the State of Indiana; and (2) the Order unlawfully circumvents the "interconnection agreement" procedures established by § 252 of the Federal Act.

Ameritech Indiana respectfully but urgently requests that the Commission carefully examine the pertinent legal authorities detailed below, which establish these grounds for reconsidering and vacating the Order. Doing so will ultimately avoid the need for appealing the Order, as well as related proceedings here and (if necessary) in the reviewing court seeking a stay of the Order pending appeal. If the Order is not vacated, Ameritech Indiana will need to proceed with appeal and stay proceedings – entailing substantial time and expense for the IURC and its counsel and staff, as well as for Ameritech Indiana – due to the serious legal flaws of the IURC Remedy Plan and the significant costs (totaling millions of dollars) it imposes upon Ameritech Indiana, as documented in the Affidavit of James D. Ehr submitted herewith ("Ehr Aff.). For the same reasons, Ameritech Indiana is also submitting herewith a separate Petition to Modify the Order by staying its implementation pending the Commission's decision on this Petition for Reconsideration.[1]

[1] Although IND. CODE § 8-1-3-2(b) extends the time to appeal an IURC order to 30 days after Commission decision on a petition for reconsideration, the Indiana Appellate Rules now provide that an appeal "from an order, ruling or decision of an Administrative Agency is commenced by filing a Notice of Appeal within thirty (30) days after the date of the order, ruling or decision, *notwithstanding any statute to the contrary*." IND. APPELLATE RULE 9(A)(2) (emphasis added). Hence, Ameritech Indiana will file a Notice of Appeal within the time prescribed by APP. R. 9(A)(2) to preserve its right to appeal to the Indiana Court of Appeals. A final Commission decision thereafter to vacate the Order can, however, effectively be implemented notwithstanding commencement of that appeal, which could then be dismissed as moot. The Commission's granting of the separate Petition to Modify the Order by staying its implementation pending the ruling on this Petition for Reconsideration would also eliminate the need to commence proceedings consistent with APP. R. 39 for a stay pending appeal (unless and until any Commission ruling is entered denying this Petition for Reconsideration).

Vacating the Order is also appropriate because the objectives the Commission intended to further can readily be achieved by alternative means. One alternative is adopting the remedy plan originally offered herein by Ameritech Indiana on February 9, 2001 ("Original Ameritech Plan"). The Original Ameritech Plan is essentially identical to contractual remedy plans offered by Ameritech Indiana affiliates in Texas, Kansas, Oklahoma, Arkansas and Missouri in connection with § 271 Applications to provide intrastate, interLATA telecommunications services in those States. Ehr. Aff. ¶ 9. These were approved by the FCC in part because it found such remedy plans provided sufficient incentives for those affiliates to maintain a high level of wholesale service to CLECs and discourage anti-competitive behavior.[2]

Another alternative is adopting the voluntary compromise remedy plan offered herein by Ameritech Indiana on August 2, 2002 and thereafter modified as described in the next sentence ("Ameritech Compromise Plan"). With certain changes that were negotiated with Indiana CLEC Time-Warner Telecommunications (and are immaterial to the issues presented by this Petition), the Ameritech Compromise Plan was agreed to in an amendment to a voluntarily negotiated interconnection agreement between Ameritech Indiana and Time-Warner entered into pursuant to § 252 of the Act. *See* Ehr Aff. ¶ 20. That amendment was filed with the Commission in its Cause No. 40572-INB-162ND on October 18, and posted to the IURC's website on October 21, 2002. Once it is approved, the provisions of the Ameritech Compromise Plan will, under the Act, be automatically available to any other Indiana CLEC.

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[2]*See In re Joint Application of SBC Communications Inc., et al. . . . to Provide In-Region, InterLATA Services in Texas*, 15 FCC Rcd. 18354, ¶ 423 (June 30, 2000); *In re Joint Application of SBC Communications Inc., et al. for Provision of In-Region, InterLATA Services in Kansas & Oklahoma*, 16 FCC Rcd. 6237, ¶ 273 (Jan. 22, 2002); *In re Joint Application of SBC Communications Inc., et al. for Provision of In-Region, InterLATA Services in Arkansas and Missouri*, 16 FCC Rcd. 20719, ¶¶ 127-34 (Nov. 16, 2001).

Vacating the Order and adopting the Original Ameritech Plan or the Ameritech Compromise Plan will accomplish the IURC's intended objectives, without need for further IURC or judicial proceedings in this cause and the attendant, unnecessary further delay and expense for the Commission and all concerned. For these reasons, as well as the serious legal problems with the IURC Plan detailed herein, Ameritech Indiana sincerely urges the Commission to grant this Petition, vacate the Order adopting the IURC Plan, and adopt instead either the Original Ameritech Plan or the Ameritech Compromise Plan.

## PERTINENT FACTS AND PRIOR PROCEEDINGS

This cause was initiated by Ameritech Indiana's February 2, 2000 Petition, pursuant to IND. CODE § 8-1-2-61, requesting that the IURC establish a process for evaluating Ameritech Indiana's compliance with its obligations to CLECs under § 251 of the Act, for purposes of the nonbinding recommendation the Act contemplates the Commission will make to the FCC on Ameritech Indiana's § 271 Application to provide intrastate, interLATA telecommunications services in Indiana (in everyday parlance, "long distance" authority). That § 271 Application for Ameritech Indiana long distance authority is the sole context of this IURC proceeding.

On February 9, 2001, Ameritech Indiana submitted and requested that the Commission adopt the Original Ameritech Plan as the process for measuring Ameritech Indiana's compliance with § 251 obligations for purposes of the IURC's nonbinding recommendation to the FCC on Ameritech Indiana's § 271 Application. As shown *supra* at 3 & n.2, the Original Ameritech Plan is essentially identical to contractual remedy plans offered by Ameritech Indiana affiliates in Texas, Kansas, Oklahoma, Arkansas and Missouri in connection with § 271 Applications for long distance authority in those States, which were approved by the FCC in part because it found such remedy plans provided sufficient incentives for those affiliates to maintain a high level of wholesale service to CLECs and discourage anti-competitive behavior.

However, the IURC Remedy Plan that the Commission's October 16, 2002 Order directed Ameritech Indiana to implement materially alters the Original Ameritech Plan, both in the methodology for assessing Ameritech Indiana's performance of § 251 obligations to CLECs, and in the amount of Payments to CLECs and the State of Indiana for alleged failures to meet performance standards.[3]

The IURC Plan imposes detailed performance testing, reporting and auditing requirements on Ameritech Indiana, involving over 150 separate performance measurements that are disaggregated into over 1,700 separate sub-measurements. *See* Ehr Aff. ¶ 4. It also requires Ameritech Indiana to make Payments to CLECs and the State if Ameritech Indiana's performance does not meet the IURC Plan's statistically and mathematically determined compliance standards defined for many of that Plan's various "performance measures." *Id.*

Ameritech Indiana is not generally opposed to the use of statistical and mathematical methods to evaluate whether its performance of § 251 obligations under the Act met a defined standard. As shown in the Ehr Affidavit, however, the IURC Plan's statistical and mathematical methodology for determining Ameritech Indiana compliance with performance standards and the amount of Payments for noncompliance ("IURC Methodology") requires that Payments be made

[3]The IURC Remedy Plan also imposes enormous implementation and compliance costs, totaling in the millions of dollars, on Ameritech Indiana. *See* Ehr Aff. ¶¶ 4-7.

(a) when the IURC Methodology itself does not reliably show that Ameritech Indiana failed to meet any performance standard; (b) regardless of whether CLECs have been harmed by any such supposed failure; and (c) in amounts that, assuming harm to CLECs may exist, exceed any such harm. For these reasons, the Payments the IURC Plan automatically imposes effectively constitute penalties upon Ameritech Indiana – required to be made in the same amounts for actions that result in no harm to CLECs as for actions that may result in such harms – rather than compensation to CLECs that is proportionate and reasonably related to any harm to CLECs from any Ameritech Indiana failure to meet the IURC Plan's performance standards.

First, the IURC Methodology materially alters Original Ameritech Plan's proposed statistical and mathematical methodology for determining compliance with performance standards and the amount of Payments for noncompliance ("Ameritech Methodology"). The Ameritech Methodology measured Ameritech Indiana compliance with performance standards by using statistical analysis to assess differences between wholesale results (*i.e.*, services to CLECs) and retail results (*i.e.*, services to Ameritech Indiana's own customers), while taking into account random variation, which is a fact of everyday life. An example of random variation is Ameritech Indiana's performance in installing regular residential phone service: In a given month, such installations might take an average of 2.84 days to install, but not every installation takes exactly 2.84 days. Particular installations may take a little less or a little more than 2.84 days, not due to any "discrimination" by Ameritech Indiana, but because of slight differences in random factors like weather (*e.g.*, the work might take longer in cold or rain) or traffic (*e.g.*, it may take longer for a technician to arrive due to heavy traffic or the timing of traffic lights).

Thus, some variations may cause the average installation interval for wholesale to differ from its retail analog. Ehr Aff. ¶ 10.

In the context of multiple performance measures such as those in the IURC Remedy Plan, statistical analysis provides a scientific method for analyzing many thousands of monthly performance results to assess whether they show some real disparity between wholesale and retail results, as opposed to mere random variation. The Ameritech Methodology (like its counterparts in the § 271 Applications for Texas, Kansas, Oklahoma, Arkansas and Missouri approved by the FCC) proposed the following two-step process to apply statistical principles to performance results:

> Step one examines results in each individual measurement category for each CLEC, measures the size of the difference between wholesale and retail performance (using a common statistical measure known as a "Z-statistic") and compares that difference to a "critical value" – the size difference or "Z" that is large enough to yield 95% confidence that there is some underlying performance disparity as opposed to mere random variation. An alternative way of expressing this 95% confidence level is to say there is a 5% risk of what is called a "Type I error" – *i.e.*, the risk that the test will erroneously indicate a disparity when none exists.
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> Step two examines all performance results subject to remedies in the aggregate for each CLEC, considering the 5% error rate in the individual tests. For purposes of determining whether Payment will be made to a CLEC (called "Tier 1" Payment), the Ameritech Methodology proposed to take the number of individual tests whose "Z" value exceeded the critical value, and compare that number of tests to a threshold identified as "K" – which is the number of individual test shortfalls required to yield 95% confidence that there is some real disparity in performance, as opposed to shortfalls attributable to the 5% error rate in the individual tests themselves. The value of "K" was to be determined from the number of performance tests for a given CLEC for a given month by using a statistical tool known as a "K table," which employs the laws of probability and standard statistical equations.

In short the Ameritech Methodology (a) used individual statistical tests, each with a 5% "Type I" error rate, and then (b) applied the "K table" to performance results in the aggregate, to account for the 5% "Type I error" factor in the individual tests and reduce the risk that "Tier 1" Payments to CLECs would be made in error.[4] The "K table" itself was developed by AT&T, a lead CLEC in this proceeding, in an FCC rulemaking on performance measurement. Ehr Aff. ¶ 12.

The IURC Methodology, however, retained only "step one" of the Ameritech Methodology, and eliminated "step two" – under which the "K table" would be used to adjust for the 5% error factor in the statistical results of the individual tests under "step one." In so doing, the IURC Remedy Plan adopted only half of an overall statistical methodology for performance measurement while eliminating another essential aspect that corrects for inherent errors in the aspect that it adopted. The result is that the IURC Plan, almost by definition, requires Payments by Ameritech Indiana in circumstances where it has provided nondiscriminatory service. Ehr Aff. ¶ 13.

The IURC also rejected an alternative protection against such statistical errors that was proposed in the Ameritech Compromise Plan that Ameritech Indiana volunteered in this cause on August 2, 2002. Under that alternative rejected by the IURC, the "step one" statistical analysis of individual performance measures for each CLEC would be altered to yield 97.5% confidence

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[4]Under the Original Ameritech Plan, Payments to the State of Indiana (called "Tier 2" Payments) would be assessed if there was a performance shortfall in the same individual test for three consecutive months. The IURC Remedy Plan retained this feature. Ehr Aff. ¶ 12 n.5.

that performance variations were not due to random variation, which would at least have cut the built-in error rate in half (*i.e.*, reduced it from 5% to 2.5%). Ehr Aff. ¶ 14.

The IURC Methodology also materially altered the Ameritech Methodology for calculating the amount of Payments. Under the latter, the amount of Payments would be calculated by multiplying a specified "base amount" by the number of "occurrences" of noncompliance, thereby yielding a "liquidated damages" amount Ameritech Indiana was contractually willing to agree to pay CLECs for any harm from such noncompliance. The IURC Methodology adopts the per-occurrence multiplication approach, but doubles the base amounts (increasing the amounts by 100%). The result is that the IURC Remedy Plan requires Payments that (a) exceed the amounts Ameritech Indiana agreed to pay; (b) are required regardless if there was any actual harm to a CLEC; and (c) even assuming there was such harm, exceed and are calculated without regard to the amount of such harm. Ehr Aff. ¶ 15.

One example is the IURC Remedy Plan's "Performance Measure #28 – Percent POTS/UNE-P Installations Completed Within the Customer Requested Due Date." The IURC Plan requires a Payment to a CLEC of $300 for each CLEC-requested resold POTS installation due date Ameritech Indiana missed when its performance for that CLEC is not in parity with the service provided to Ameritech Indiana for its own retail customers. In each case where this $300 Payment would be owed, the installation would have been completed (typically within days of the due date, as opposed to weeks or months) and the CLEC customer would have received service. For many products purchased by the CLEC, $300 is many times the amount of payment they would make to Ameritech Indiana for the installation. Likewise, the $300 Payment bears no relation to the revenue (if any) the CLEC lost from its customer due to the delay (again, typically at most several days) in completing the installation. Ehr Aff. ¶ 16.

In addition to materially altering the Ameritech Methodology proposed in the Original Ameritech Plan, the IURC Remedy Plan also materially altered the only substantive aspect it included from the Ameritech Compromise Plan. The Ameritech Compromise Plan reflected negotiations that took place after the IURC suggested that parties to this proceeding seek to reach an industry-agreed remedy plan. The IURC specifically requested that parties provide "red-lined" proposed changes to a remedy plan ordered by the Illinois Commerce Commission in comparable regulatory proceedings involving the Ameritech operating company in that State ("Illinois Remedy Plan"). Ameritech Indiana submitted several proposed changes to the Illinois Remedy Plan, which were based on the Ameritech Compromise Plan developed in those negotiations. Ehr Aff. ¶ 17.

The IURC Remedy Plan included only one substantive component of Ameritech Indiana's proposed changes to the Illinois Remedy Plan – namely, the "Step-Down Table." Basically, Ameritech Indiana proposed to use a Step-Down Table that would work as follows: When performance for a specific CLEC did not meet the defined standard for a performance measure for repeated months, then performance of that standard would be subject to higher remedy Payment levels for that CLEC until continuous performance meeting or exceeding the standard was delivered. But the IURC Plan changed the Step-Down Table into a device that increases Payments to *all* CLECs who are due Payments for a specific measurement in the event Ameritech Indiana's *overall* performance ("aggregate Tier-1 performance") for that measurement does not meet or exceed the standard. Thus, the IURC took this feature and applied it to all CLECs *regardless* of whether they had experienced *any* previous shortfalls, and increased Payments to those CLECs in the event Ameritech Indiana did not meet or exceed the performance standard in the current month. Ehr Aff. ¶ 18.

While Ameritech Indiana has not been able to fully quantify the monetary impact of this material alteration of the "Step-Down" concept, it has generally been able to assess the differences between the Payments that would be made for the actual performance provided Indiana CLECs in September 2002 under the Original Ameritech Plan, the Ameritech Compromise Plan, and the IURC Plan. Performance provided to Indiana CLECs in September 2002 met or exceeded the standard of comparison for 96.9% of measures subject to remedies. Given the inherent 5% Type I error in the statistical analysis described above, this reflects an extremely high level of service. As illustrated by Table 3 of the Ehr Affidavit, the Ameritech Compromise Plan would increase Payments made to CLECs eleven-fold, and total "Tier 1" Payments and "Tier 2" Payments to the State by 80%, compared to the Original Ameritech Plan. The Remedy plan, however, increases these total Payments *five-fold*, with "Tier 1" Payments to CLECs increasing *more than 24 times*, with no evidence of any such harm being suffered by the individual CLECs. See Ehr Aff. ¶ 19.

As shown supra at 3, the Ameritech Compromise Plan has now been adopted as an amendment to the interconnection agreement between Ameritech Indiana and Time-Warner, and (once that amendment is approved) will be automatically available to any other Indiana CLEC.

## GROUNDS FOR RECONSIDERING AND VACATING THE ORDER

### I. The Commission Lacks Statutory Authority To Order The Ameritech Indiana Payments To CLECs And To The State Required By The IURC Remedy Plan.

As our Supreme Court has recently reiterated, the Commission is a creature of statute and has no powers beyond those specifically granted it by the General Assembly:

> The Commission, as an administrative agency, "derives its power and authority solely from the statute, and unless a grant of power and authority can be found in the statute it must be concluded that there is none." *General Tel. Co. of Indiana, Inc. v. Public Serv. Comm'n of Indiana*, 238 Ind. 646, 651, 150 N.E.2d 891, 894 (1958) (quoting *Chicago & E.I. R. Co. v. Public Serv. Comm'n of Indiana*, 221 Ind. 592, 594, 49 N.E.2d 341, 341 (1943)). Notwithstanding its purpose "to insure that public utilities provide constant, reliable, and efficient service to [their] customers, the citizens of this state," *Office of Utility Consumer Counselor v. Public Serv. Co. of Indiana, Inc.*, 463 N.E.2d 499, 503 (Ind. Ct. App. 1984), the Commission itself recognizes its jurisdictional limits: "this Commission . . . has only such jurisdiction as is *specifically* delegated by statute." *In re Madison Light & Power Co.*, 1924C Pub. Util. Rep. (PUR) 517, 519 IPSC 1924).

*Indiana Bell Tel. Co. v. Indiana Util. Regulatory Comm'n*, 715 N.E.2d 351, 354 n.2 (Ind. 1999) (brackets & ellipses added by Court).[5]

Indiana law is equally clear that the Commission has no statutory authority – including under IND. CODE § 8-1-2-69, cited by the Order at 4 as conferring "Commission authority to issue orders regarding quality of service" – to order payment of money damages. The Commission "can exercise only administrative or legislative powers. It has no judicial powers and cannot award money judgments." *Public Serv. Ind., Inc. v. Nichols*, 494 N.E.2d 349, 353 (Ind. Ct. App. 1986) (citations omitted). "It has no authority to adjudicate a breach of contract action or to grant a money judgment." *Indiana Tel. Co. v. Indiana Bell Tel. Co.*, 171 Ind. App. 616, 624, 358 N.E.2d 218, 224 (1976), *modified on other grounds*, 360 N.E.2d 610 (1977).

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[5] Unless otherwise indicated, all quotation emphasis has been added.

"IND. CODE 8-1-2-69 provides the Commission a mechanism to assure that future services are provided but provides no remedy for past harm." *Nichols*, 494 N.E.2d at 354.

Here, the IURC Remedy Plan adopted by the Order establishes a set of "performance standards" to be met by Ameritech Indiana, and then specifies Payments Ameritech Indiana must make to CLECs and to the State if performance does not meet those standards (based on the IURC Methodology for measuring Ameritech Indiana's performance). Thus, the Order not only imposes duties on Ameritech Indiana, but also establishes and mandates money Payments Ameritech Indiana must make to CLECs and the State for future breaches of such duties. In essence, the Order prospectively (and automatically) requires Ameritech Indiana to make Payments, based on possible future failures to meet the IURC Plan's performance standards, that the Commission would have no statutory power to order even *after* any such future failure allegedly took place, and was found following an IURC investigation to have occurred in fact. Neither IND. CODE § 8-1-2-69 nor any other statute grants the Commission authority to do this.

The Commission would lack such authority even if the Payments required by the IURC Remedy Plan pay were in fact triggered by, and calculated based upon, the existence and amount of actual harm to CLECs or the State caused by any allegedly insufficient performance of IURC Plan obligations by Ameritech Indiana. That lack of authority is all the more evident since (as shown *supra* at 5-11) the IURC Plan's required Payments are not based upon the existence or amount of any harm to any of the entities to which the Payments must be made. Instead, those mandated Payments constitute "penalties," which the Commission has no power either to award to private parties or to assess on behalf of the State.

In other words, even if the Commission *did* have any authority to order payment of money damages for a utility's alleged non-performance of its obligations, it would still have no power to order the Payments mandated by the IURC Plan because they constitute "penalties" rather than compensable "damages. Even where contracting parties have agreed to payment of a specified sum on breach, "[a] liquidated damages provision will be enforced only if the sum stipulated to in the contract constitutes damages, and not a penalty." *Hahn v. Drees, Perguni & Co.*, 581 N.E.2d 457, 462 (Ind. Ct. App. 1991). Where the amounts required to be paid under the contract "bear no reasonable relationship to the amount of damages incurred," then the payment "clause clearly would impose a penalty, and is thus unenforceable." *Id. Accord, e.g., Skendzel v. Marshall*, 261 Ind. 226, 232, 301 N.E.2d 641, 645 (1973) (if specified "damages are unreasonable, *i.e.*, if they are disproportionate to *the loss actually suffered*, they must be characterized as penal rather than compensatory").

Two specific tests under Indiana law make even clearer that the Ameritech Indiana Payments to CLECs required by the IURC Remedy Plan constitute invalid "penalties."

First, a liquidated damages provision constitutes a penalty when it "would mandate the same penalty for actions *which in fact result in no harm* . . . as it would for actions which actually result in harm." *Hahn*, 581 N.E.2d at 462, citing *Seach v. Richards, Dieterle & Co.*, 439 N.E.2d 208, 216 (Ind. Ct. App. 1982). This is demonstrably the case under the IURC Remedy Plan, which (a) requires Payments to CLECs even though the IURC Methodology for demonstrating supposed non-performance by Ameritech Indiana does not even reliably indicate any such non-performance; and (b) does so without regard either to whether any CLEC has actually been harmed or to the amount of any supposed harm.

Second, under Indiana law "[t]he distinction between a penalty provision and a liquidated damages provision *is that a penalty is imposed to secure the performance of the contract*, and liquidated damages are to be paid in lieu of performance." *Rogers v. Lockard*, 767 N.E.2d 982, 991 (Ind. Ct. App. 2002). Here, the Order adopting the IURC Remedy Plan repeatedly shows on its face that the purpose of that Plan's required Payments fit the "penalty" rather than the "damages" category. *See* Order at 4 (Plan will "*impose a monetary disincentive* upon Ameritech Indiana if it fails to deliver such nondiscriminatory service or meaningful opportunity to compete"; Plan will "*impose a monetary disincentive* on Ameritech Indiana if it fails to deliver that quality of service"). A "monetary disincentive," of course, is just another way of saying "penalty" or "fine." Indeed, the Order makes the Plan's "penalty" aspects explicit even when it also recites supposed "compensation" purposes for CLEC's (which are in fact belied by the lack of any relationship between the required Payments to the existence or amount of any actual harm to CLECs). *See id.* at 4-5 (Order's "goal" is to approve Plan "that adequately compensates the CLECs for Ameritech's failure to meet the approved performance standards ***and*** *sufficiently motivates Ameritech Indiana to end any discriminatory conduct that impedes the development of competition in Indiana*").

The IURC Plan's required Payments to the State are likewise unauthorized "penalties" – and here, without even a coat of "compensatory" veneer. Such Payments are triggered without regard to any "harm" to the State from any Ameritech Indiana failure to meet the IURC Plan's performance standards; and neither the Order nor the IURC Plan even suggest that any such Ameritech Indiana failure will cause any such "harm." Nor does IND. CODE § 8-1-2-69 or any other statutory provision confer any authority upon the Commission to impose or even seek imposition of civil penalties or fines – a type of authority the Legislature plainly knows how to grant when it wishes to confer such power on an administrative agency. *See, e.g, Indiana Dep't of Envtl. Management v. Medical Disposal Serv., Inc.*, 729 N.E.2d 577, 579-80 (Ind. 2000) (discussing statutory authority to seek "civil penalties" granted to IDEM).

The necessary but absent statutory authority to order Payments (either as "damages" to private parties or "civil penalties" to the State) also is not supplied by IND. CODE § 8-1-2-69's general closing clause authorizing the IURC to "make such other order respecting such measurement, regulation, act, practice or service as shall be just and reasonable." Exercise of *any* Section 69 authority requires *ab initio* that the IURC "find," upon "investigation," that "any regulations, measurements, practices, acts or service [are] unjust, unreasonable, unwholesome, unsanitary, unsafe, insufficient, preferential, unjustly discriminatory or otherwise in violation of this act" or "that any service is inadequate or that any service which can be reasonably demanded can not be obtained." No "find[ing]" on any such matter was made in this cause, which was initiated under IND. CODE § 8-1-2-61 and did not even involve a Section 69 "investigation."

Furthermore, the specific IURC authority conferred by Section 69 is to "determine and declare and by order fix just and reasonable measurements, regulations, acts, practices or service to be furnished, imposed, observed and followed in the future in lieu of those found to be unjust, unreasonable, unwholesome, unsanitary, unsafe, insufficient, preferential, unjustly discriminatory or otherwise in violation of this act." Nothing in this list of specific powers, which precedes the section's "make such other order" clause, remotely relates to ordering money damages or assessing civil penalties. The scope of any such general clause is controlled and limited by the specific statutory language preceding it. *E.g., Consolidated Rail Corp. v. Lewellen*, 682 N.E.2d 779, 783-84 (Ind. 1997) ("When construing the meaning of the terms 'other facilities,' we apply the principle of *ejusdem generis*, which maintains that 'where words of specific and limited signification in a statute are followed by general words of more comprehensive import, the general words shall be construed as embracing only such persons, places, and things as are of like kind or class to those designated by the specific words'"; citation omitted); *State v. C.M.B. III Enter.*, 734 N.E.2d 653, 662 (Ind. Ct. App. 2000) (under *ejusdem generis* principle, general language did not confer agency power to impose financial penalties beyond limited civil penalty specified in statute whose other specific sanctions were non-monetary; citing *Consolidated Rail*).

Nor can adoption of the IURC Remedy Plan and its Payment mandates be justified as an exercise of Commission "rulemaking" authority under IND. CODE §§ 8-1-1-3 & -15 (cited by the Order at 3). First, nothing in these or any other rulemaking sections authorizes the IURC to require the Payments (again, either as "damages" to private parties or "civil penalties" to the State). Second, this cause and the adoption therein of the IURC Plan – whose sole context is the § 271 Application of a particular party (Ameritech Indiana) and its dealings with other particular parties (Indiana CLECs) on matters related to that Application – involves exercise of IURC adjudicatory, not rulemaking, power. Commission "actions impacting upon particular parties or issues . . . are in the nature of adjudications and must perforce rest upon factual determinations, the results of which are amenable to judicial review." *Indiana & Mich. Elec. Co. v. Public Serv. Comm'n*, 492 N.E.2d 323, 325 (Ind. Ct. App. 1986). The proceeding here plainly fits these adjudicatory criteria.[6]

In sum, it is one thing for the Commission to approve a proposed contractual remedy plan offered by Ameritech Indiana as part of a § 271 Application to the FCC, as the Commission originally set out to do. But the Commission has no statutory authority to impose a materially different remedy plan outside of section 271, that imposes Payments to which a party has *not* agreed. This is abundantly so when, as under the IURC Remedy Plan, those materially different and significantly larger Payments constitute penalties. The Order directing Ameritech Indiana to implement the IURC Remedy Plan therefore exceeds the Commission's statutory authority, and should be vacated on reconsideration.

## II. The Order Adopting The IURC Remedy Plan Unlawfully Circumvents The Interconnection Agreement Procedure Established By The 1996 Federal Act.

In addition to exceeding the Commission's statutory authority under Indiana law, the Order's direction that Ameritech Indiana implement the IURC Remedy Plan conflicts with – and is therefore preempted by – the 1996 Federal Act.

Congress consciously chose a "de-regulatory framework" for implementing the nondiscrimination requirements of the Act. H.R. CONF. REP. NO. 104-458, at 113 (1996). The

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[6]The fact that the Order effectively converted this adjudicatory proceeding from one that was focused solely on Ameritech Indiana's § 271 Application into a far different kind of adjudicatory proceeding – resulting in imposition of penalties upon Ameritech Indiana – also presents serious due process issues that will necessarily arise in any appeal of the Order. These issues, too, can be avoided by reconsidering and vacating the Order.

keystone of that framework is use of interconnection agreements, rather than regulatory fiat, to determine how an incumbent local exchange carrier (such as Ameritech Indiana) will fulfill its obligations to CLECs – including the obligations under § 251 of the Act whose satisfaction is pertinent in a § 271 Application. The procedures and timetables for creating such interconnection agreements are carefully delineated in § 252 of the Act.

The Original Ameritech Plan was therefore a contractual remedy plan designed to work within the Act's deregulatory framework. *See* Ameritech Indiana's Submission of Performance Remedy Plan at 3 (Feb. 9, 2001) (Plan's remedies would be available to CLECs "after incorporating the performance assurance plan in their interconnection agreements"). The later Ameritech Compromise Plan was likewise a contractual remedy plan, which has now been adopted in the Time-Warner interconnection agreement (and therefore will, once that agreement is approved, automatically be contractually available to other Indiana CLECs as well).

By contrast, the IURC Remedy Plan adopted by the Order is designed to evade the Act's contractual and deregulatory framework. The IURC Plan explicitly states: "This Plan is available to CLECs as a *stand-alone* document, *independent of the Section 251/252 interconnection agreement process*." IURC Remedy Plan § 2.1 at 6. It requires only that a CLEC "opt-in" by notifying Ameritech Indiana, *id.*, rather than engaging in the negotiation and other carefully detailed procedures set forth in § 252 of the Act. The Order adopting the IURC Plan is made immediately "effective on and after the date of its approval." Order at 5.

The Order adopting the IURC Remedy Plan thus circumvents and conflicts with, and is therefore preempted by, the Federal Act. As the United States Supreme Court has repeatedly observed: "Pre-emption may be either expressed or implied and 'is compelled whether Congress' command is explicitly stated in the statute's language *or implicitly contained in its structure and purpose*.'" *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 98 (1992) (citation omitted). Significantly, Federal law not only preempts State law that conflicts with Federal *substantive* standards, but also trumps State action that "*interferes with the methods* by which the federal statute was designed to reach [its] goal." *Id.* at 103.

As the Court has explained, because "[c]onflict in technique can be fully as disruptive to the system Congress erected as conflict in overt policy," the scope of Federal preemption extends to "'specially designed procedures . . . to obtain uniform application of [Congress's] substantive rules . . . .'" *Amalgamated Ass'n of Street, Elec. Ry. & Motor Coach Employees v. Lockridge*, 403 U.S. 274, 287 (1971) (citation omitted). Where "Congress plainly meant to do more than simply to alter the then-prevailing substantive law," but "sought as well to restructure fundamentally the processes for effectuating that policy," State action that conflicts with or undermines Congress's chosen "technique of administration" must fall. *Id.* at 287-88. In short, "'conflict is imminent' when 'two separate remedies are brought to bear on the same activity.'" *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 380 (2000) (citations omitted).

These principles apply with full force to the 1996 Federal Act, which not only "alter[ed] the then-prevailing substantive law," but "sought as well to restructure fundamentally the processes for effectuating that policy." *Lockridge*, 403 U.S. at 288. One of the most significant matters addressed by the Act is implementation of its local competition provisions *via* the § 252 interconnection agreement process, involving negotiation, arbitration, approval and Federal judicial review. These are "specially designed procedures" (*Lockridge*, 403 U.S. at 287), mandated by Congress, that result in self-contained "agreements" constituting the "binding" statement of the parties' respective interconnection rights and obligations. 47 U.S.C. § 252(a)(1). The Order's adoption instead of a "stand-alone" Plan to enforce interconnection obligations – explicitly declared to be "*independent* of the Section 251/252 interconnection agreement process" – patently "interferes with the methods by which the federal statute was designed to reach [its] goal," *Gade*, 505 U.S. at 103.

Furthermore, when a State commission imposes new obligations outside of the § 252 process, it does not simply gut the Congressionally-chosen method of implementing local competition through private negotiation. It also circumvents the Act's judicial review process. *See MCI Telecomm. Corp. v. GTE Northwest, Inc.*, 41 F. Supp. 2d 1157, 1177-78 (D. Or. 1999) (State commission-ordered tariff "conflicts with the Act and is preempted" because, by "dispens[ing] with the interconnection agreement altogether" and "allowing CLECs to order services 'off the rack' without an interconnection agreement," commission had illegally "bypasse[d] the Act entirely and ignore[d] the procedures and standards that Congress has established"); *Verizon North, Inc. v. Strand*, 140 F. Supp. 2d 803, 810 (W.D. Mich. 2000) (State commission, by allowing an entrant to purchase products and services without entering into the process to negotiate and arbitrate an interconnection agreement, "thus evades the exclusive process required by the 1996 Act and effectively eliminates any incentive to engage in private negotiation, which is the centerpiece of the Act"). The same principles were just applied in vacating a comparable order of the Wisconsin commission. *Wisconsin Bell, Inc. v. Bie*, No. 01-C-0690-C (W.D. Wis. Sept. 27, 2002).

Thus, the Order's adoption of the IURC Remedy Plan not only exceeds the Indiana statutory authority that is the first and fundamental prerequisite to any valid Commission order. It also conflicts with and is therefore preempted by the Federal Act. This is an independent reason the Order should be reconsidered and vacated.

## CONCLUSION

The Order adopting the IURC Remedy Plan exceeds the Commission's statutory authority. It also circumvents the interconnection agreement procedure established by the preemptive Federal Act. Ameritech Indiana respectfully urges the Commission to vacate the Order, and adopt instead either the Original Ameritech Plan or the Ameritech Compromise Plan.

Respectfully submitted,


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## CERTIFICATE OF SERVICE

I hereby certify that on November 6, 2002 I caused a true and correct copy of the foregoing Petition for Reconsideration to be served to Ameritech271@urc.state.in.us.

Peter J. Rusthoven [# 6247-98]

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